U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 17, 2016

BY ECF (REDACTED) AND FACSIMILE

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst,
15 Cr. 643 (PKC)

Dear Judge Castel:

The Government has received disclosures from defendant Gary Hirst pursuant to Fed. R. Crim. P. 26.2 setting forth prior statements of Hirst's expected trial witnesses. One of the witnesses Hirst intends to call is Hirst's daughter, Tracy Hirst. The Government understands that Hirst's daughter [redacted] as such evidence is of no probative value and is therefore irrelevant under Fed. R. Evid. 401. Further, the probative value of such [redacted] evidence is substantially outweighed by the potential for causing the jury to decide this matter based not on the evidence presented, but instead from feelings of sympathy, and such [redacted] evidence is therefore excludable under Fed. R. Evid. 403.

Additionally, to the extent that Ms. Hirst will testify as a character witness for Mr. Hirst, any such testimony must be limited to opinion or reputation testimony. Fed. R. Evid. 405(a). Ms. Hirst may not testify on direct examination about specific instances of Hirst's prior good conduct. *See United States* v. *Chan*, No. S11 97 Cr. 1053 (PKL), 2002 WL 109528, at * (S.D.N.Y. Jan. 25, 2002) ("Thus, unless character is an essential element of the crime charged, on direct examination only reputation and opinion evidence may be used to prove the defendant's character, and specific instances of conduct may not be admitted."). The mere fact that the Government must prove Hirst's knowledge and intent does not transform the crimes with which he is charged into ones where character is "an essential element of the offense," and thus Hirst's alleged crimes do not fall within the ambit of Fed. R. Evid. 405(b). *See United States* v. *Doyle*, 130 F.3d 523, 542 (2d Cir. 1997) ("if specific good deeds could be introduced to disprove knowledge or intention, which are elements of most crimes, the exception of Rule 405(b) would swallow the general rule of 405(a) that proof of specific acts is not allowed.”).

It is well established, however, that once a defendant has put his character in issue the Government may cross-examine character witnesses concerning relevant specific instances of the defendant’s conduct. *See* Fed. R. Evid. 405(a). Such instances may include misconduct that never led to an arrest, as well as arrests that did not result in convictions. *See United States* v. *Birney*, 686 F.2d 102, 108 (2d Cir. 1982); *United States* v. *Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975). Questions about specific instances of conduct are permitted to evaluate the character witness’s credibility, although not to prove the defendant’s guilt; and under certain circumstances may include questions regarding the offense at issue. *See Birney*, 686 F.2d at 108; *United States* v. *Damblu*, 134 F.3d 490,495 (2d Cir. 1998); Advisory Committee Notes to Rule 405 (“[S]ince the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard.”). The Government must have a good faith basis to believe the acts occurred, and the questions must be relevant to the character traits at issue. *See Michelson* v. *United States*, 335 U.S. 469, 481 n. 18 (1948).

In sum, the Government respectfully requests that the Court preclude Hirst from eliciting from his daughter information about [redacted] and from eliciting any character evidence that is not in the form of reputation or opinion testimony.

Respectfully submitted,

PREET BHARARA
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